IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 29TH JUNE 2007 / 8TH ASHADHA 1929

RSA.No. 723 of 2006()

AS.90/2001 of DISTRICT COURT, KOLLAM
OS.725/1996 of .PRL.MUNSIFF COURT, KOLLAM

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: APPELLANT/RESPONDENT/PLAINTIFF

GOVINDAN NAMBOODIRI,
S/O.KRISHNAN NAMBOOTHIRI,
RETIRED PROFESSOR,
KOLLOOR, IX/469, PATTATHANAM,
KOLLAM.

BY ADV. SRI.P.G.PARAMESWARA PANICKER (SR.)
SRI.P.GOPAL

RESPONDENT: APPELLANT/DEFENDANT

M.A.NINAN, S/O.ABRAHAM,
MANAPPURATHU VEEDU, PATTATHANAM,
VADAKKEVILA VILLAGE, KOLLAM,
REP. BY HIS POWER OF ATTORNEY HOLDER,
THOMAS VARGHESE, S/O.KOSHY THOMAS, PUTHEN VEEDU,
NEAR BOAT JETTY, VADAKKUMBHAGOM WARD.

BY ADV. SRI.S.V.BALAKRISHNA IYER
SRI.K.JAYAKUMAR
SRI.P.B.KRISHNAN

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON 29/06/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER ON I.A.NO.1860/2006 IN R.S.A.NO.723/2006

29.6.2007 DISMISSED SD/- M.Sasidharan Nambiar
Judge

/true copy/

M.SASIDHARAN NAMBIAR,J.

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R.S.A. NO.723 OF 2006

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Dated this the 29th day of June,2007

JUDGMENT

Plaintiff in O.S.No.725/1996 on the file of Munsiff Court, Kollam is the appellant. Defendant is the respondent. The appellant is admittedly the owner in possession of plaint A schedule property. Plaint B schedule property is the way provided to plaint A schedule property. Suit was filed seeking a decree for permanent prohibitory injunction restraining respondent from putting up a gate at the entrance point of plaint B schedule way from the public road and causing any obstruction to the usage of the plaint B schedule way. The trial court granted a decree for injunction. First appellate court held that respondent is entitled to put up a gate and it will not be an infringement of the right of way and therefore held that appellant is not entitled to the decree sought for. It is challenged in the Second Appeal.

2. The second appeal was admitted formulating the following substantial question of law.

1) Whether installation of a gate at the entrance of plaint B schedule way is an infringement of the right of way to plaint A schedule property as provided under section 27 of Indian Easement Act?

2) Whether in the light of the provisions contained in Ext.A1, respondent unilaterally entitled to derogate the extent of the right of way provided thereunder?

3. There is no dispute on the facts of the case. 48 cents in survey No.459/1 of Vadakkevila village which lies to the north of Kollam-Kannanalloor public road originally belonged to Jacob Joseph. On the death of Jacob Joseph, his legal heirs sold 8 cents out of the said property being the south eastern portion of the whole

property to Thomas Das who was examined as DW2. The balance extent was sold by the legal heirs to the respondent as per Ext.B1 sale deed dated 16.2.1972. Respondent constructed a building on the north western six cents plot. It is the plaint A schedule property. Appellant was the building tenant under respondent. Subsequently respondent constructed a residential building in the south western portion wherein he resides and another house in between the plaint A schedule property and the south western portion. That building is in the possession of a tenant under him. Respondent purchased 3 cents out of 8 cents belonging to DW2 being its northern portion. Thereafter along with the 3 cents the remaining property being the north eastern portion was gifted by respondent to his daughter. That property lies to the east of plaint A schedule property. Plaint

B schedule property is the way provided under Ext.A1 sale deed. It starts from the southern public road and ends in plaint A schedule property and lies to the west of the property belonging to DW2 and the property of the daughter of respondent under the gift deed and to the east of the residential and tenanted portion of the property of respondent. Admittedly there are compound walls on the east and west of plaint B schedule way with gates opening to it from the property of the daughter of respondent and the compound occupied by the tenant. Ext.C2 report with C3 sketch shows that plaint B schedule way is having a length of 34.5 meters on the west and 35 metres on the east and having a width of 3.2 meters on the south where it starts from the public road and 3.10 metres on the north where it ends. Ext.A1 establishes that plaint B schedule pathway is provided thereunder as

the way to plaint A schedule property. The right of way over plaint B schedule way by easement of grant is not disputed. The dispute is with regard to the right of respondent to put up a gate at the southern end of the pathway preventing unrestricted entry to the plaint B schedule property. Case of appellant is that if such a gate is put up at the southern end, it would cause obstruction to the free and full usage of the plaint B schedule way. According to the appellant, he is conducting a tuition class at his house and therefore students have to reach his house and no obstruction shall be caused. It is also contended that his daughter is a doctor having practice and therefore patients have to reach his house by vehicle at odd hours and putting up a gate will cause hindrance to the free usage of plaint B schedule way and it is an infringement on the right of way provided under

Ext.A1. The case of respondent was that there was a gate at the southern end and the pillar was got damaged when a lorry hit it and when the gate was to be repaired, it was obstructed by the appellant and so the suit was instituted. Respondent would also contend that being the owner of the plaint B schedule property, it is his right to put up a gate without causing any infringement on the usage of the plaint B schedule way. It is further contended that putting up a gate is necessary for securing plaint B schedule way from being misused by anti- social elements and any difficulty that may be caused to the appellant could be prevented by handing over a key of the gate to the appellant so that he can use the way at his will and pleasure.

4. Learned Munsiff on appreciating the evidence found that there was no gate previously as claimed

by respondent. Learned Munsiff also found that by putting up a gate, infringement will be caused to the right of way available to the appellant and therefore held that appellant is entitled to the decree. First Appellate Court quoting Katiyar Commentary on Law of Eastement and Licences held that putting up of a gate will not cause any infringement on the right of way provided under Ext.A1 as provided under section 27 of Indian Easement Act if the key of the gate is handed over to the appellant and so appellant is not entitled to the decree sought for. The first appellate court additionally found that evidence establish that there was a gate at the southern entrance point of the plaint B schedule way and appellant is not entitled to obstruct the putting up of a gate.

5. The argument of the learned Senior Counsel

appearing for appellant is that the right of way provided under Ext.A1 is a right for the full usage of the plaint B schedule way on all days and at all times and putting up a gate at the entrance is an infringement on the right of usage especially when the appellant is conducting tuition classes at his house and his daughter is a doctor having practise at his house and therefore first appellate court should not have interfered with the decree granted by the trial court. Relying on the passages from Law of Easement and Licenses by Sanjiva Row learned Senior counsel argued that putting up of a gate on the southern entrance of the plaint B schedule way would definitely be a hindrance to the free and full usage of plaint B schedule way and supplying of one of the keys of the gate will not be an answer to the infringement caused. Quoting the commentaries from Katiyar's Law of Easements and

Licences it was argued that first appellate court omitted to take note of the relevant portion of the commentaries and Section 27 of Indian Easements Act prohibits respondent from causing any infringement on the right of way and therefore the decree and judgment passed by the first appellate court are to be set aside.

6. Learned counsel appearing for respondent on the other hand argued that respondent being the owner of the plaint B schedule way is entitled to prevent anti social elements from using that way causing difficulty to the appellant and his daughter and tenant, and providing a gate and supplying a key will not cause any infringement on the right of way available to the appellant and therefore argued that first appellate court rightly applied the law. Reliance was also placed by the learned counsel on the text of Katiyar's Law of

Easements and Licences and argued that modern cases discussed by the author point out that putting up of a gate will not cause an infringement on the right of way and therefore there is no reason to interfere with the decree and judgment.

7. Ext.A1 unambiguously establish that plaint B schedule property is provided as a way to the plaint A schedule property. Ext.A1 also shows that plaint B schedule way which starts from the southern road, reaches plaint A schedule property and is having a uniform width. Ext.C2 proves that the plaint B schedule way is now enclosed by walls on the east and west with opening to enter the way from the west to the property belonging to the daughter of respondent and from the west for the tenanted plot which lies to the south of plaint A schedule property. The northern end is at plaint A schedule property and southern end is at the public

road. The gate of the residential plots of respondent and DW2 are to the southern public road. As rightly argued by the learned Senior counsel appellant is entitled a right of easement by grant over plaint B schedule property. In law he is entitled to use the full extent of the way and that too 24 hours of the day. Being the owner of the servient tenement respondent is not entitled to cause any obstruction or infringement to the right of way over plaint B schedule property. Section 32 of Indian Easements Act expressely provides that the owner or occupier of the dominant heritage is entitled to enjoy the easement without disturbance by any other person.

8. Section 27 of the Indian Easements Act mandates that though the servient owner is not bound to do anything for the benefit of the dominant heritage, and is entitled to use the

servient heritage in any way consistent with the enjoyment of the easement, he must not do any act tending to restrict the easement or to render its exercise less convenient.

9. Section 27 reads:-

> "Servient owner not bound to do anything--The servient owner is not bound to do anything for the benefit of the dominant heritage, and he is entitled, as against the dominant owner, to use the servient heritage in any way consistent with the enjoyment of the easement; but he must not do any act tending to restrict the

easement or to render its exercise less convenient."

The effect of an easement is the imposition of an obligation on the servient owner to suffer being done or refrain from doing something on his own tenement for the advantage of the dominant tenement. A servient owner is not entitled to deal with his tenement in such a way as to render the easement incapable of being enjoyed or more difficult of enjoyment. He is not entitled to transgress the dominant owner's right of full enjoyment. It is not permissible for him to cause any inconvenience to the owner of the dominant heritage. But he is entitled to enjoy the servient tenement without causing any restriction on the right of dominant tenement. The question is whether putting up a gate at the entrance point of the plaint B schedule way would be an infringement

on the right of usage of the way available to the appellant. As provided under section 32 of Indian Easements Act, the owner or occupier of the dominant heritage is entitled to enjoy the easement without disturbance by any other person. Katiyar's Law of Easements & Licences Twelth Edition at page 590 deal with the commentary on the obstruction caused to a right of way by construction of gates. It reads:-

> "Obstruction by construction of gates- With respect to the particular disturbance of a private right of way caused by the servient owner erecting a gate across the way, the following dictum by Jones, J. occurs in his report of

James v. Hayward. If a private man has a way across the land of J.S, by prescription or grant, J.S. cannot make a gate across the way; and if on a private way a gate cannot be made a multo fortiori, it cannot be made on a highway which would be prejudicial to many". In Andrews v. Paradise, the plaintiff recovered judgment against the defendant for breach of covenant for quiet enjoyment, the breach consisting of the erection

of a gate across a way. The case was argued on demurrer, which admitted the plaintiff's allegation that the defendant had erected a gate across the way per quod the plaintiff's tenant was obstructed. In Kidgill v. Moore, declaration by the plaintiff (owner in reversion of the dominant tenement) against the defendant for fasetening a gate made across a private way was held good after verdict.

Modern cases have placed

the law on a clearer footing. It has been laid down in the Court of Appeal in England that a gate is not necessarily an interference with a private right of way. To be actionable the interference must be substantial. And it has been laid down in Ireland that whether a gate is or is not an interference with the right is a matter of fact. In both the last-mentioned cases the erection of a gate across a private way was held to be no

> interference with a right, proper facilties being given to the dominant owner who on his part, is under an obligation to close after him a gate which has been left unlocked for his convenience. If a gate across a private way is locked, it is no answer to a complaint of the obstruction to say that keys will be supplied."

The argument of the learned counsel appearing for respondent is that as modern law is that the owner of the servient tenement is entitled to put up a gate on the way as putting up of a gate on the way is not an infringement on the right of way

available to the dominant tenement and therefore first appellate court correctly applied the law. The learned Senior counsel on the other hand argued that plaint A schedule property is 35 metres away from the southern public road and putting up a gate 35 meters away from the residential house of the appellant would definitely be an infringement of the right of way available to him by easement of grant. It is argued that appellant is entitled to use the plaint B schedule way at any time and even at 1 'O' clock in the night and if somebody has to come to the house of the appellant, whether a patient of his daughter or some other guest, appellant will be compelled to walk the distance of 35 metres from his house at the odd hour and they open the gate to enable the entry into the way and it would definitely be an infringement of the right of way as it would limit

the right to use the plaint schedule way. The answer of the learned counsel appearing for respondent is that so long as one of the keys is provided to the appellant, it will not cause any obstruction.

10. True, in view of the modern trend, it cannot be said that in all cases putting up a gate at the entrance point of the way by the owner of the servient tenement would automatically be an infringement on the right of way. It depends on the facts of each case. If the way provided is through the middle of a property and if the way is kept opened, it may cause difficulty to the enjoyment of his property by the servient owner. Providing a gate at the entrance point and handing over of one of the keys to the owner of the dominant tenement in such a case may not be an infringement as contemplated under section 27 of

the Indian Easements Act. But as in this case, where plaint B schedule way is lying in the middle enclosed by walls on either sides with opening only to the southern public road and leads to the plaint A schedule property providing a gate at the southern end is different. When the dominant tenement is 35 meters away from the public road,putting up a gate at the road entrance by the servient owner would definitely cause an infringement on the right of way available to the respondent. Even if one of the keys is supplied to the appellant, it would adversely affect the right of way provided under Ext.A1 and to that extent, putting up of a gate and closing the gate would be an infringement of the right of way available to the appellant under Ext.A1. If that be so,it would be an actionable wrong as provided under section 27 of the Indian Easements Act.

11. On the facts trial court applied the law correctly but first appellate court has erred wrong in interfering with that finding. Though first appellate court has also found that a gate was in existence at the entrance point of the plaint B schedule way originally as against the finding of the trial court, in the light of the earlier finding it is not very relevant. On the facts and evidence that finding also does not appear to be correct. If there was a gate at the entrance point as found by the first appellate court, its existence would have been definitely mentioned in Ext.A1 sale deed especially when the lie of the way to plaint A schedule property was described in detail in Ext.A1 sale deed and a right of way provided thereunder. It is more so, because plaint B schedule way is described in Ext.A1 with reference to the boundaries of

property of DW2 and respondent and not on any gate. If there was a gate at that point of time, reference would have been definitely made about the pillars on both sides of the way. In fact trial court appreciated the evidence in the proper perspective in the light of the report submitted by the Commissioner and found that the gate was not there as claimed by the respondent. On the facts and evidence, that finding is correct. As I have already found that putting up of a gate at the entrance point of plaint B schedule way would cause an infringement on the right of way for the free and full usage of plaint B schedule property provided under Ext.A1, appellant is entitled to the decree for injunction granted by the trial court.

Second Appeal is allowed. The decree and judgment passed by the District Court, Kollam in A.S.90/2001 are set aside and that of the

Munsiff's Court, Kollam in O.S.725/1996 are restored.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006